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The Store (M) Sdn Bhd v Rohaizat bin Yacob & Ors

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HIGH COURT (JOHOR BAHRU) — CIVIL SUIT NO JA-22NCC-4–03 OF 2016
SEE MEE CHUN J
15 AUGUST 2018

C

Companies and Corporations — Directors — Recovery of debt against director — Whether directors had carried on business of company (later wound up) with intent to defraud its creditors or for any fraudulent purpose — Companies Act 1965 s 304(1)

D

In the instant action under s 304 of the Companies Act 1965, the plaintiff sued the defendants jointly and severally as directors of a company that had since been wound up ('the company') for debts the company owed the plaintiff. Section 304 allowed such an action to be commenced against directors who had carried on the business of a company with intent to defraud its creditors or for any fraudulent purpose. The trial proceeded only as against the first and sixth defendants ('D1' and 'D6') as the second, third and fourth defendants ('D2', 'D3' and 'D4') failed to enter an appearance while the claim against the fifth defendant was withdrawn. The plaintiffs' action against the defendants grew out of a tenancy agreement it signed with the company under which the plaintiff was granted a subtenancy of a piece of land ('the demised premises') that the company had occupied. A dispute between the parties over the legality of the agreement saw the High Court at first instance dismissing the plaintiff's claim and allowing the defendants' counterclaim. On appeal to the Court of Appeal ('the COA'), the plaintiff won its case and had the High Court decision set aside. The litigation resulted in the company owing the plaintiff RM3,961,261.55 ('the claimed sum') for damages and costs which included a refund of RM1.5m ('the stay order payment') the plaintiff earlier had to pay the company to secure a stay of execution pending the outcome of the COA appeal. The company failed to pay any part of the claimed sum before it was wound up. In the instant action, the plaintiff alleged that D1, as the chief executive officer and founding director of the company, was the company's controlling mind. The plaintiff alleged that the defendants fraudulently induced the plaintiff into entering into the tenancy agreement and proceeded to collect monthly rentals despite knowing that the company's occupation of the demised premises was unlawful and that it had no right to grant the plaintiff any subtenancy. The plaintiff also alleged that D6 (who was D4's wife) dishonestly/illegally siphoned out for her own benefit RM910,000 from the stay order payment while the balance amount was used to pay third parties. In her defence, D6 pleaded, inter alia, that since she only became a director in

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March 2007, she could not be responsible for anything that had happened earlier.

Held, dismissing the plaintiff's claim against D1, entering judgment against D2, D3 and D4 and ordering D6 to pay the plaintiff the sum of RM1.5m with interest at 5%pa from 21 July 2014 until date of full payment:

(1) The evidence showed that D1 was never the controlling mind of the company as was alleged. He was in no position to have made any representations to the plaintiff. He had no knowledge of any forgery and, in particular, the tenancy agreement was entered into at a time when the administration, management and finance of the company were not under his control. D1 did not commit any fraudulent acts against the plaintiff and therefore was not liable under s 304 of the Companies Act (see paras 54 & 59).

(2) Since D2, D3 and D4 had not entered appearance in the action, they were deemed to have admitted to all the allegations against them in the plaintiff's statement of claim (see para 119).

(3) It was a fit and proper case for s 304(1) of the Companies Act 1965 to be applied as against D6 as she had intended to defraud the company's creditors by causing the stay order payment of RM1.5m to be siphoned out despite knowing that that amount had to be paid back if the plaintiff won the appeal. As D6 was not responsible for any fraudulent acts before she became a director, she was not liable for losses and damages said to have been suffered by the plaintiff before then that originated from the forged documents and the representations. These were the damages and costs as per the COA order, the rental paid and the legal costs (see paras 65 & 113).

[Bahasa Malaysia summary

Dalam tindakan ini di bawah s 304 Akta Syarikat 1965, plaintif menyaman defendan-defendan secara bersama dan berasingan sebagai pengarah syarikat yang telah digulung ('syarikat') untuk hutang yang syarikat itu berhutang kepada plaintif. Seksyen 304 membenarkan tindakan sedemikian dimulakan terhadap pengarah yang menjalankan perniagaan syarikat dengan niat untuk menipu pemiutangnya atau untuk sebarang tujuan penipuan. Perbicaraan diteruskan hanya terhadap defendan pertama dan keenam ('D1' dan 'D6') kerana defendan kedua, ketiga dan keempat ('D2', 'D3' and 'D4') gagal untuk memasukkan kehadiran sementara tuntutan terhadap defendan kelima ditarik balik. Tindakan plaintif-plaintif terhadap defendan-defendan berkembang daripada perjanjian penyewaan yang ditandatangani dengan syarikat di mana plaintif telah diberikan sewaan kecil sebidang tanah ('premis tersebut') yang telah diduduki oleh syarikat itu. Pertikaian antara pihak-pihak berkenaan dengan kesahihan perjanjian itu menyaksikan Mahkamah Tinggi pada

mulanya menolak tuntutan plaintif dan membenarkan tuntutan balas pihak terdakwa. Pertikaian antara pihak-pihak berkenaan dengan kesahihan perjanjian itu menyaksikan Mahkamah Tinggi pada mulanya menolak tuntutan plaintif-plaintif dan membenarkan tuntutan balas defendan-defendan. Apabila merayu kepada Mahkamah Rayuan ('MR'), plaintif memenangi kesnya dan menyebabkan keputusan Mahkamah Tinggi diketepikan. Undang-undang ini mengakibatkan syarikat terhutang oleh plaintif RM3,961,261.55 ('jumlah yang dituntut') untuk ganti rugi dan kos yang termasuk bayaran balik sebanyak RM1.5 juta ('bayaran pesanan untuk penginapan') yang mana plaintif terdahulu membayar syarikat itu untuk mendapatkan tinggal pelaksanaan sementara menunggu keputusan rayuan MR. Litigasi ini mengakibatkan syarikat berhutang kepada plaintif sebanyak RM3,961,261.55 ('jumlah yang dituntut') untuk ganti rugi dan kos yang termasuk bayaran balik sebanyak RM1.5 juta ('bayaran perintah penggantungan') yang mana plaintif terdahulu membayar syarikat itu untuk mendapatkan tinggal penggantungan pelaksanaan sementara menunggu keputusan rayuan MR. Syarikat gagal untuk membayar mana-mana bahagian tuntutan sebelum ia digulung. Dalam tindakan ini, plaintif mendakwa bahawa D1, sebagai ketua pegawai eksekutif dan pengarah pengasas syarikat, adalah orang yang mengawal syarikat. Plaintif mendakwa bahawa defendan secara penipuan penyebabkan plaintif memasuki perjanjian penyewaan dan meneruskan untuk mengutip sewa bulanan walaupun mengetahui bahawa pendudukan syarikat di premis tersebut adalah menyalahi undang-undang dan bahawa ia tidak mempunyai hak untuk memberikan plaintif apa-apa sewaan kecil. Plaintif juga mendakwa bahawa D6 (iaitu isteri D4) secara tidak jujur/tidak sah membawa keluar untuk kepentingannya sendiri sebanyak RM910,000 dari pembayaran pesanan penggantungan sementara jumlah baki digunakan untuk membayar pihak ketiga. Dalam pembelaannya, D6 memohon, antara lain, kerana dia hanya menjadi pengarah pada bulan Mac 2007, dia tidak boleh bertanggungjawab terhadap apa-apa yang telah berlaku sebelumnya.

Diputuskan, menolak tuntutan plaintiff terhadap D1, memasukkan penghakiman terhadap D2, D3 dan D4 dan memerintahkan D6 untuk membayar plaintif jumlah RM1.5 juta dengan faedah 5% setahun dari 21 Julai 2014 sehingga tarikh pembayaran penuh:

(1) Keterangan menunjukkan bahawa D1 tidak pernah mengawal syarikat itu seperti yang didakwa. Dia tidak mempunyai kedudukan untuk membuat apa-apa representasi kepada plaintif. Dia tidak mengetahui apa-apa pemalsuan dan, khususnya, perjanjian penyewaan itu dimasuki pada masa pentadbiran, pengurusan dan kewangan syarikat itu tidak berada di bawah kawalannya. D1 tidak melakukan apa-apa tindakan penipuan terhadap plaintif dan oleh itu tidak bertanggungjawab di bawah s 304 Akta Syarikat (lihat perenggan 54 & 59).

(2) Oleh kerana D2, D3 dan D4 tidak memasuki kehadiran dalam tindakan itu, mereka dianggap untuk mengakui semua tuduhan terhadap mereka dalam pernyataan tuntutan plaintif (lihat perenggan 119).

(3) Ini adalah satu kes yang sesuai dan betul untuk s 304(1) Akta Syarikat 1965 untuk digunakan terhadap D6 kerana dia bercadang untuk menipu pemiutang syarikat dengan menyebabkan perintah pembayaran penangguhan RM1.5 juta dibawa keluar walaupun mengetahui bahawa jumlah itu perlu dibayar balik jika plaintif memenangi rayuan itu. Oleh kerana D6 tidak bertanggungjawab terhadap apa-apa tindakan penipuan sebelum dia menjadi pengarah, dia tidak bertanggungjawab terhadap kerugian dan kerosakan yang dikatakan telah ditanggung oleh plaintif sebelum itu yang berasal dari dokumen palsu dan representasi. Ini adalah ganti rugi dan kos seperti perintah MR, sewa yang dibayar dan kos undang-undang (lihat perenggan 65 & 113).]

Notes

For a case on recovery of debt against directors, see 3(1) *Mallal's Digest* (5th Ed, 2018 Reissue) para 442.

Cases referred to

Aik Ming (M) Sdn Bhd & Ors v Chang Chin Chuen & Ors and another appeal [1995] 2 MLJ 770; [1995] 1 MLRA 546, CA (refd)

Aneka Melor Sdn Bhd v Seri Sabco (M) Sdn Bhd and another appeal [2015] MLJU 2247; [2016] 2 CLJ 563, CA (refd)

Chin Chee Keong v Toling Corp (M) Sdn Bhd [2016] 3 MLJ 479, CA (refd)

Dato' Prem Krishna Sahgal v Muniandy a/l Nadasan & Ors [2018] 2 MLJ 693; [2017] 10 CLJ 385, FC (refd)

Re Mahel Investments Pty Ltd and the Companies Act (1979) 4 ACLR 35, SC (refd)

Siow Yoon Keong v H Rosen Engineering BV [2003] 4 MLJ 569, CA (refd)

Legislation referred to

Companies Act 1965 s 304, 304(1)

Gideon Tan (Ee Jen Chin with him) (Gideon Tan Razali Zaini) for the plaintiff.
Mohd Fairuz Abdullah (Mohd Najid & Partners) for the first defendant.
KS Pang (Teo Wen Chyi with him) (KS Pang & Co) for the sixth defendant.

See Mee Chun J:

INTRODUCTION

[1] The plaintiff is a private limited company engaged in the business of the operation of supermarket and department stores throughout Malaysia. The

defendants were at one time or other directors of Rohaizat Holding (M) Sdn Bhd ('the company'). The company was wound up on 10 February 2015 (82/204). This is the plaintiff's claim against all the directors for fraudulent trading pursant to s 304 of the Companies Act 1965.

[2] Defendant 2 to defendant 4 failed to enter apperance whereas the claim against defendant 5 was withdrawn. The trial poceeded as against defendant 1 and defendant 6.

BACKGROUND FACTS

(a) Tenancy between the company and the plaintiff and the ensuing court case

[3] The plaintiff had entered into a tenancy agreement with the company dated 20 September 2005 (82/47–62, the original agreement) where the company agreed to sub let to the plaintiff and plaintiff agreed to rent a piece of land in Mukim Plentong, Johor Bahru ('demised premises'). This was followed by a supplementary agreement dated 29 January 2007 (82/63–66, the supplementary agreement) to vary certain terms of the original agreement. The original agreement and the supplementary agreement will be collectively referred to as the tenancy agreement.

[4] There was a dispute between the plaintiff and the company over the legality and validity of the supplementary agreement. The plaintiff filed an action in the Johor Bahru High Court ('JBHC') Suit No 22–32 of 2008 ('Suit 32') against the company with a counterclaim by the company. On 24 June 2011 the plaintiff's claim was dismissed and the company's counterclaim allowed (82/152–153). The plaintiff filed its appeal, Civil Appeal No J-02–1844 of 2011 ('Appeal 1844'). It also filed a stay application which was allowed by JBHC on 22 September 2011 conditional upon the plaintiff paying the company a sum of RM1.5m (82/176–177, stay order) which sum was paid on 11 October 2011.

[5] On 21 July 2014 the plaintiff's apppeal was allowed, JBHC decision set aside and the supplementary agreement held valid and binding. The company was also ordered to pay the plaintiff a sum of RM1,404,093 with interest of 5%pa from 24 June 2011 until the date of full settlement, return the sum of RM1.5m pursuant to the stay order and costs of RM100,000 (82/201–202). This will be collectively referred to as COA order.

(b) Tenancy between Tekad and the company and the ensuing court case

[6] The registered owner of the demised premises was KCSB Konsortium Sdn Bhd ('KCSB') with Tekad Urus S/B ('Tekad') as its lawful attorney to deal

with the demised premises. Tekad then tenanted the demised property to the company. A dispute arose between Tekad, KCSB and the company. The company initiated JBHC Suit No 22–585 of 2008 ('Suit 585') wherein Tekad and KCSB counterclaimed. The core issues for determination were which agreement did the parties sign whether it was the tenancy agreement dated 1 April 2003 (82/8–25) or the agreement dated 10 June 2003 (82/26–44) and whether the termination by Tekad was lawful.

[7] On 11 November 2011 the company's claim was dismissed where the JBHC held that the agreement binding on the parties was that dated 10 June 2003 and not that dated 1 April 2003 and its termination was valid and lawful (82/198–199, para 27). The court also found that a letter dated 1 September 2005 (82/45–46) from Tekad to the company extending the tenancy until 31 March 2021 was forged (82/193–194, para 20).

[8] The company's appeal to the Court of Appeal, and application for leave to appeal to the Federal Court, were dismissed.

THE CLAIM

[9] According to the plaintiff, the defendants had control of the company prior to its winding up. It was pleaded that at all material times defendant 1 was chief executive officer of the company and one of the first directors when it was incorporated on 22 August 1996 and the controlling mind of the company who conducted its affairs and business (para 8). The plaintiff's claim against the defendants premised on s 304 of the Companies Act 1965 was that the defendants had carried out the business of the company with the intention to defraud the plaintiff and/or for fraudulent purposes by the following acts as set out in para 30 of its amended statement of claim:

(a) the defendants particularly defendant 1 knew full well that the agreement dated 1 April 2003 (purported main tenancy agreement) and/or the letter dated 1 September 2005 (forged letter) were forgeries and yet caused the company to represent to the plaintiff the existence of that agreement which would expire on 31 March 2012 and extended by Tekad until 31 March 2021 (representations);

(b) the defendants had forged the purported main agreement and produced it to induce the plaintiff into entering the tenancy agreement in 2005;

(c) the defendants did not disclose the same in Suit 32 and/or Appeal 1184 during the course of the proceedings from 10 October 2007–21 July 2014;

(d) the defendants continued to receive monthly rental from the plaintiff despite knowing that the company was occupying the demised premises unlawfully and could not grant any tenancy and/or sub let to the plaintiff;

(e) the defendants caused the company to receive RM1.5m from the plaintiff pursuant to the stay order; and

(f) after the RM1.5m was paid to the company on 11 October 2011, defendant 6 had dishonestly and/or illegally siphoned out a total sum of RM910,000 wherein the said sum was made payable to herself and also authorised payments amounting to RM30,500 to defendant 2. Defendant 6 had rendered dishonest assistance to the defendants including but not limited to defendant 2 and/or defendant 4 to siphon out monies from the company.

[10] Paragraph 31 pleaded that the acts as stated above also constituted the carrying on of the business of the company by the defendants with intent to defraud the plaintiff and/or fraudulent purpose.

[11] From the plaintiff counsel's oral reply the fraudulent acts were in three stages. Firstly the inducement of the plaintiff to enter into the tenancy agreement, secondly the conduct of the litigation and thirdly when the RM1.5m was paid pursuant to the stay order whereby the money was not used for bona fide purposes.

LOSS AND DAMAGE

[12] Plaintiff stated it suffered loss and damage whereby it incurred legal costs and expenses to enforce the tenancy agreement; not being able to execute and/or recover any money due and owing from the company pursuant to the COA order including the RM1.5m and RM450,000 being the monthly rental for the demised premises from January 2007 to June 2011 which the company was not entitled to. The particulars of loss and damage are as follows:

(i)	Damages as per COA order	RM1,404,070.93
(ii)	Monies paid pursuant to stay order	RM1,500,000
(iii)	Costs as per COA order	RM100,000
(iv)	Rental paid	RM450,000
(v)	Legal costs	RM507,190.62
	TOTAL	RM3,961,261.55

DEFENCE OF DEFENDANT 1

[13] Defendant 1 denied being the controlling mind of the company and that the administration and management of the company was under defendant 3 and defendant 4 when they were appointed as directors on 29 July 2004 and that of defendant 6. He denied making any representation to the plaintiff nor any knowledge of the RM1.5m paid to the company. He was made a bankrupt on 3 December 2009 and the annulment of the adjudicating and receiving order (AORO) was made on 18 October 2015 after the money had been siphoned. The company could have entered into the tenancy with the plaintiff as at the time of entering the tenancy agreement, the agreement with Tekad dated 10 June 2003 was valid and the company thus had valid possession of the demised premises.

DEFENCE OF DEFENDANT 6

[14] The defence of defendant 6 was that the representations made to the plaintiff and the company's agreements with Tekad and with the plaintiff were all entered into prior to her appointment as director on 6 March 2007. The same goes for the purported letter dated 1 September 2005. Prior to the RM1.5m paid to the company by the plaintiff, as at October 2011, the company was indebted to her for the amount of RM570,558.65 being an advance made by her plus interest and this is as set out in para 18.5(c). After the payment of the RM1.5m the company made payments as shown in Schedule A which essentially sets out the date, amount of payment and to whom paid. Since November 2011 defendant 6 had paid on behalf of the company a sum of RM181,407.60. Before appeal 1844 was allowed by the Court of Appeal on 21 July 2014 the RM1.5m was a judgment sum paid by by the plaintiff to the company.

ISSUES

[15] The issues to be tried were whether the defendants had entered into the tenancy agreement with the plaintiff with the intent to defraud the plaintiff and/or fraudulent purposes and whether the defendants had made the representations pleaded in para 14 (that it had a tenancy agreement dated 1 April 2003 with Tekad to tenant the demised premises and sub let to interested parties with the duration to expire on 31 March 2012 and Tekad had extended it to 31 March 2021 by the letter dated 1 September 2005). Another issue pertained to the siphoning of money after the payment of RM1.5m to the company on 11 October 2011. Subsequent to the determination of the earlier issues the further issue would be whether the defendants are jointly and severally liable to the plaintiff for all debts of the company amounting to RM3,961,261.55.

WITNESSES

[16] Witness for the plaintiff was Mr Pek Ak Keong (PW1, Senior General Manager of The Store Corp which is the holding company of the plaintiff and witness statement marked as WSP1 and supplementary witness statement as WSP1A). Witness for defendant 1 was defendant 1 himself (DW1 (D1) and witness statement marked as WSD1 (D1)). Witnesses for defendant 6 were Mr Lieu Lu Sang who is defendant 2 (DW1 (D6) and defendant 6 herself (DW2 (D6) and witness statement marked as WSD2 (D6)).

AGREED FACTS

[17] It was agreed between the plaintiff and defendant 1 and defendant 6 that the defendants were directors and their respective tenure were as follows:

	Date of appointment	Date of resignation
Defendant 1	22 August 1996	14 October 2011
Defendant 2	9 June 2003	-
Defendant 3	29 July 2004	-
Defendant 4	29 July 2004	-
Defendant 6	6 March 2007	22 January 2014

[18] It was further agreed that that prior to its winding up the company was engaged in the business of letting out properties. It was not disputed this was its only business and the only property rented out was the demised premises.

[19] As between the plaintiff and defendant 6 it was agreed that defendant 6 is the wife of defendant 4, was one of the authorised signatories in the company and that from 18 October 2011 to 24 November 2011 the company had deposited a total sum of RM910,000 to defendant 6.

THE LAW ON FRAUDULENT TRADING

[20] Section 304(1) of the Companies Act 1965 upon which the claim was made provides as follows:

> 304 Responsibility for fraudulent trading
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> (1) If in the course of the winding up of a company or in any proceedings against a company it appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose, the Court on the appliction of the liquidator or any creditor or contributory of the company, may, if it thinks proper so to do declare that any person who was knowingly a party to the carrying on of the business in that manner shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the Court directs.

[21] In *Chin Chee Keong v Toling Corp (M) Sdn Bhd* [2016] 3 MLJ 479 the primary object of s 304(1) was explained thus at pp 487–488:

> The primary object behind sub-s 304(1) of the Companies Act 1965 is to statutorily provide for the lifting of the veil of incorporation in the specific circumstances of fruadulent trading with a view to ultimately pinning personal accountability and liability on the directing minds behind such trading of the company. Subsection 304(1) affords the creditor of the company a civil remedy personally against such persons.

[22] On the meaning of 'intent to defraud', the Court of Appeal in *Aneka Melor Sdn Bhd v Seri Sabco (M) Sdn Bhd and another appeal* [2015] MLJU 2247; [2016] 2 CLJ 563 had this to say at p 576:

> The phrase, 'with intent to defraud' is the most problematic element of s 304(1). The general proposition from the seminal case of *Morphitis v Bernasconi* [2003] Ch 552 is that for behaviour to fall under section 213(1) of the English Insolvency Act (which is in *pari materia* with our s 304 of the Companies Act 1965), there must be dishonesty in the form of incurring company debts by those in charge when either they know that they will not be repaid or there is a substantial and unreasonable risk that they will not be. Indeed, Chadwick LJ accepted counsel for the director's submission that:
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> > There is a distinction between a fraud on a person that give rise to a claim in damages against the company and the carrrying on of the business of the company with intent to defraud.

[23] As to the standard of proof required, this was considered in *Siow Yoon Keong v H Rosen Engineering BV* [2003] 4 MLJ 569, *Aneka Melor* and *Chin Chee Keong* where it was held to be on a balance of probablities. Hence in *Chin Chee Keong* it was stated at p 492:

> ... Not so much because this is the standard under civil fraud but because sub-s 304(1) itself sets the standard of proof that must be met. The term if 'it appears' is deployed in the provision and this clearly indicates that a lower degree of proof is required. That lower degree of proof is on a balance of probabilities. It cannot go any lower than the civil burden of proof.

INVOLVEMENT OF DEFENDANT 1

[24] It was pleaded defendant 1 knew full well that the purported main tenancy agreement and/or the purported letter were forgeries and yet caused the company to represent to the plaintiff the existence of that agreement which would expire on 31 March 2012 and extended by Tekad until 31 March 2021 and the defendants had forged the purported main agreement and produced it to induce the plaintiff into entering the tenancy agreement in 2005.

[25] It is not disputed defendant 1 was a director of the company which bears his name when it was first incoporated in 1996 and he signed the purported main tenancy agreement with Tekad dated 1 April 2003. That without more does not mean that defendant 1 had knowledge it was a forged document. This is all the more when the JBHC decision on 11 November 2011 which found it to be forged did not state which director was responsible. This is confirmed by PW1 when he was asked as to whether the JBHC decison on the forged agreement made a finding that any defendant was involved in the forgery he replied 'I can't find any decision on that'. The next question was:

> Qn: Just that there was a decision on the agreement just being forged just like without naming any of the diredtors, correct?
>
> Ans: It is stated so in the decision.

(NOP1/30).

[26] The evidence next shows there to be a sale and purchase of shares agreement dated 7 July 2004 in 86/10–19 where defendant 1 and the other shareholders of the company sold 50% of shares to IE Design & Construction S/B (IE Design) of which his was 10%. In fact defendant 4 by virtue of being the majority shareholder in IE Design (86/20–25) had acquired 50% of the shares in the company where 86/4–9 showed IE Design held 310,000 shares in the company.

[27] This was all confirmed by PW1 in his cross-examination where he was referred to the sale and purchase of shares agreement and asked that the shareholders of the company had sold 50% of the shares to IE Design replied 'It is stated so'. On 86/20–25 the company search on IE Design showing defendant 4 as director and majority shareholder PW1 said 'It is stated so'. When it was put to him defendant 4 though IE Design had acquired 50% of the shares in the company the reply was again 'It is stated so'. PW1 agreed that based on the sale and purchase of shares agreement defendant 4 subsequently became a director on 29 July 2004 and had 50% of the shares in the company. (All in NOP1/13–15). PW1 was not aware that defendant 1 had sold his shares in the company to defendant 4 (NOP1/10).

[28] According to defendant 1 the reason for defendant 4 as well as defendant 3 coming in was that the company lacked funds to develop the demised property and they could help secure funds. Initially the demised property was 'hutari' with no building. Subsequently the company constructed the building. As it lacked the funds defendant 2 brought in IE Design which was owned by defendant 4 to buy their shares in the company. (All in NOP1/76–79). He stated for '50% steel structure *yang tidak ada dinding*' was renovated by the plaintiff and this was extensive renovation (NOP1 82–83).

[29] This was also the evidence of DW1 (D6) (Lieu) who was defendant 2 and a subpoenaed witness. Lieu was a director from 9 March 2003 and a shareholder. As to how defendant 4 became involved in the company, Lieu stated defendant 4 did a contract for the company and there was no money to pay him and he was asked to join the company. Lieu agreed the demised premises was a bare piece of land and defendant 4 though IE Design built the steel frame, shops and car park. This was the contract the company could not pay defendant 4 and he was invited to come in, given shares and became director (NOP2/58–59).

[30] The fact of defendant 4 coming in to the company as a director since 29 July 2004 and becoming its majority shareholder lends credence to defendant 1 evidence the administration, management and finance of the company was controlled in particular by defendant 4 and that defendant 1 in his words became a 'sleeping partner' (NOP1/79).

[31] There was next an arrangement between defendant 1, defendant 2 and defendant 4 dated 29 June 2004 (86/1–3) where the rental from what was referred to as Plaza Rakyat belonged to defendant 4. Defendant 1 and defendant 2 were given the right to collect rental from several lots. In cross-examination defendant 1 stated the rental to him and defendant 2 were from seven lots and he had no more control over the rental from Plaza Rakyat. Defendant 1's evidence ties in with the evidence of PW1. PW1 was referred to 86/1–3 and para 5 and agreed that defendant 4 would have the authority to deal with Pasar Rakyat. He futher agreed Pasar Rakyat was a building renovated by The Store with its business there. On defendant 4 not being entitled to collect the rental from the seven lots and defendant 1 and defendant 2 being entitled to receive the collection from defendant 4 of the rental of the seven lots he replied 'It is stated so'. (All in NOP 1/11–12).

[32] This agreement on the proceeds of rental would show that from late June 2004 that defendant 1 no longer managed the company especially as defendant 4 came in as director and majority shareholder.

[33] The above thus was the context under which defendant 1 signed the tenancy agreement as a director of the company along with the other directors. According to defendant 1 the terms were determined by defendant 3 and defendant 4, in particular the monthly rental of RM130,000 where RM40,000 was paid to Tekad and the balance RM90,000 to the company. Tekad was also paid the rental as defendant 4 wanted to ensure the plaintiff dealt with Tekad as the lawful attorney. Defendant 1 also said the original copies of agreements were handed over to defendant 4 when he took over in 2004 and defendant 1 did not keep any copy. He was only a director who acted on the directions of defendant 4 who made the decision to rent to the plaintiff. With regard to the

tenancy agreement with the plaintiff he said he did not check the terms as defendant 4 had directed a lawyer KF Hua to do so after which it was signed (NOP2/21). In cross-examination he stated he signed on the directions of defendant 4 as 'sebab masa itu kita dah tak ada apa-apa lagi. Kita cuma director sahaja' (NOP1/84).

[34] According to PW1 when the plaintiff entered into the tenancy agreement the company had revealed its contractual relationship with Tekad. As to who negotiated the terms he replied 'from our records it was First to Fourth Defendant'. He did not know who prepared the draft. (NOP1/18–19). With reference to the tenancy agreement it was put to him the company was represented by a solicitor Hua Kia Fook and the plaintiff by its legal advisor Tan Kong Hoon he replied 'Yes, it's stated there'. When it was further put to him the draft agreement was prepared by the solicitor and the legal advisor he said 'It should be so'. (NOP1/20). He confirmed the rental of RM40,000 was paid directly to Tekad all the while and the balance of RM90,000 to the company.

[35] The above thus renders it probable defendant 1's evidence he was asked by defendant 4 to sign in his capacity as director and that he did not make any representation to the plaintiff to enter into the tenancy agreement. He essentially signed on the say so of defendant 4 and the terms were negotiated earlier and the draft prepared by the company's lawyer on defendant 4's directions.

[36] The fact of the purported letter dated 1 September 2005 would also show defendant 1 was not involved as by then it was defendant 4 who was managing the company.

[37] The further evidence is that defendant 1 was never a signatory for the company cheques ever since it opened its account with CIMB. Other than the circular resolution dated 30 July 2007 in 84/76 where he signed as director appointing signatories, defendant 1 had never signed any other circular resolution to this effect. This is borne out by the evidence of PW1 and defendant 6 as shown below.

[38] PW1 agreed defendant 1 was not the signatory of the CIMB account opened by the company. As to who was the signatory of the cheques he noted that one of them was defendant 6 and did not notice defendant 1 to be a signatory. He was taken through the various circular resolutions on the signatory and asked:

> Qn: I put to you after we have gone through so many Circular Resolutions, D1 from 2004 was never the signatory of the cheques of the company?

Ans: No document to say so.

Qn: I ask you yes or no?

Ans: Yes.

(NOP1/38).

[39] He agreed the last persons authorised to sign was defendant 6 or Atilia bt Amir ('Atilia').

[40] Defendant 6 agreed that circular resolution dated 8 May 2007 in 84/91 was when she was first appointed as signatory. Defendant 1 did not sign the circular. Prior to that defendant 2 and defendant 4 were the signatories by virtue of circular resolution dated 30 July 2004 in 84/76. This was the first circular in respect of signatories. She was next referred to circular resolution dated 21 June 2007 in 84/85 and agreed that one Mohd lzhar bin Ahmad was the sole signatory and that defendant 1 did not sign the circular. The circular resolution dated 2 November 2010 in 84/133 was not signed by defendant 1. In the last circular resolution dated 23 September 2011 in 84/151 the authorised signatories were Atilia who is defendant 4's niece and herself and defendant 1 did not sign the circular. She disagreed defendant 1 had been sidelined in all the circular resolutions. (All in NOP3/20–24).

[41] The above evidence of PW1 and defendant 6 would in fact show defendant 1 had nothing much to do with the affairs of the company where he did not even sign any circular resolution to authorise the appointment of signatories what more being appointed as signatory. This also points towards being sidelined in all the circular resolutions despite defendant 6's denial.

[42] As to whether defendant 1 received any benefit from the tenancy agreement it was his evidence he never benefited and/or receive any monies from the payments made by the plaintiff in respect of the tenancy of the demised premises. The plaintiff had sought to establish that the agreement for the rental of proceeds between defendant 1 and defendant 2 with defendant 4 meant that defendant 1 had benefited indirectly. It was submitted as follows in p 41 of the plaintiff's submission:

> 41. The 1st Defendant contention that he did not make any profit out of the tenancy between Plaintiff and Rohaizat is also not true as it is well evinced that the 1st Defendant's benefit may not be directly from the rentals paid by Plaintiff but the 1st and 2nd Defendants had admitted to receiving benefit ie from the sub tenants for the smaller lots which cannot be possible without the help or assistance of the 4th Defendant in developing Lot 1876. In return the 1st Defendant will sign any documents to give effect to to the Tenancy Agreement so that ultimately the 4th Defendant will be able to receive rentals from Plaintiff'.

(Note: reference to Lot 1876 is in respect of the demised premises).

[43] PW1 had explained why he disagreed the agreement in 86/1–3 did not show defendant 1 receiving any benefits as follows:

> ... that this subject property ... actually involving a building, a simple structure or building called pasaraya and the car park. And few other lots. And all this actually come together as a very crucial part. I would say Defendant 1 need The Store to pump in money to renovate their pasaraya. To make it become a very comprehensive anchor tenant there so that the seven lots or seven tenants ... could be survived and continue to operate there. And by doing this Defendant 1 actually can get an income from the rental from these seven lots. So this is a benefit that can be obtained by Defendant 1.
>
> (NOP1/64–65).

[44] However this submission is without basis. It was defendant 1's evidence that the tenants of the seven lots were already renting from the company before the plaintiff rented the demised premises, sometime end 2003 (NOP2/22). This evidence is consistent with the agreement on rental proceeds where in para 1 of 86/1 was stated the seven tenants were already there *('telah tersedia ada di tapal').* There was no mention of the plaintiff in that agreement. Hence the rentals from the seven sub tenants were ready to be collected. There was nothing to show that at the material time the company was trying to secure the tenancy with the plaintiff. It follows there was nothing untoward by defendant 1 to enter into such proceeds of agreement rental with defendant 4. Further, this arrangement on rental proceeds predates the tenancy agreement which means it was entered into before the plaintiff arrived at the scene. The question thus arises how is it then possible for defendant 1 to contemplate the existence of the plaintiff based on the tenancy agreement entered into in 2005 against an arrangement entered into earlier. It is therefore the court's finding the agreement on rental proceeds did not benefit defendant 1.

[45] PW1 disagreed defendant 1 did not benefit from the transaction between the plaintiff and the company. He was then asked:

Qn:	Where is the proof that the Defendant had obtained monetary gains, from the the documents, from the CIMB account belonging to the Company. Can you pinpoint any from this documents?
Ans:	I do not have that
Qn:	You don't have that right? Who actually benefitted from the transaction between these agreements that were entered previously?
Ans:	It would be the Defendants, all the Defendants in this suit.

(NOP1/33).

[46] As to whether defendant 6 was the who who benefitted from the transaction when she obtained RM910,000 he replied 'she was one of them'. The following questions were then posed:

> Qn: Was the First Defendant one of them? Surely you have gone through all the documents, the CIMB accounts is very thick, it is voluminuous ... I put it to you that the First Defendant did not obtain a single cent from this transaction based on the Bundle of documents, the Statement of Accounts produced by your solicitors?
>
> Ans: I do not agree.
>
> Qn: If you do not agree, please show me that the First Defendant benefitted from the transactions or the payments made by the Plaintiff.
>
> Ans: I do not have the documents to show that.

(NOP1/34).

[47] PW1's evidence as above would show there was no proof of the benefit accruing to defendant 1 arising from the tenancy agreement. The contention that defendant 1 would go to the extent of being willing to sign any documents put before him by defendant 4 without regard to the truth of the contents in order to safeguard his benefit is not sustainable.

[48] With regard to the conduct of the litigation defendant 1 said he was aware of suit 32 as he had been imformed by defendant 2 and did not give any directions to the company's solicitor in the defence and counterclaim. He was a witness upon being asked by the solicitor, one L Partiban, who prepared the questions and answers. The solicitor was appointed by defendant 4 as it involved his interests in the demised property. He was informed by defendant 2 the company won the suit and he did not know the details. He did not know of the RM1.5m paid by the plaintiff to the company. He was aware of Suit 585. He did not give any directions to the company's solicitor and was a witness upon being asked by the solicitor, one Hua Kia Fook who prepared the questions and answers. He was aware of the issues and the decision and was informed by defendant 2 the valid agreement was that dated 10 June 2003.

[49] In cross-examination as to his involvement in the litigation between the plaintiff and the company he said he was a witness and did not remember the evidence he gave or any document he signed. When shown the stay order in 82/176–177 which referred to an affidavit in response dated 11 July 2011 affirmed by him, he stated this was the first time he had seen the stay order and when asked again if he signed the affidavit he replied *'tak faham'*. (All in NOP2/13–14). Although defendant 1 may have signed the affidavit that appeared to be his only involvement in the litigation. In any event it does not

negate the earlier finding he was no longer managing the company since 2004.

[50] Further the stay order along with requirement of a payment of the RM1.5m was made earlier on 22 September 2011 and only then JBHC decision in suit 585 on 11 November 2011 on the forged documents.

[51] It was Lieu's evidence those involved in the agreement between the plaintiff and the company and Tekad and the company were himself, defendant 1 and defendant 4. With regard to the litigation between the parties the same three persons were involved but not defendant 6. (All in NOP2/38–40). Before the company was wound up it was also them involved in the management of the company (NOP2/46). In cross-examination Lieu agreed that defendant 1 was a bankrupt in 2009 and discharged as one in 2015 and that from 2009 until 18 October 2015 defendant 1 was not able to carry out his duty as a director due to this. He agreed with the suggestion defendant 6 was the controlling mind of the financial affairs of the company and received instructions from defendant 4.

[52] In this regard it was not disputed that defendant 1 was adjudged a bankrupt on 3 December 2009 (82/214–217) and the AORO annuled on 18 October 2015 (82/222–223). It was also defendant 1's evidence he ceased to be a director of the company when he was made a bankrupt but it was only on 14 October 2011 SSM's record was updated. He had informed defendant 4 so that the company secretary would do the needful.

[53] Thus despite Lieu's evidence that defendant 1 was involved in the agreements and the management of the company, the evidence as the court has outlined above shows the contrary.

[54] Defendant 1 was never the controlling mind of the company as alleged and was in no position to make the representations to the plaintiff and therefore did not commit fraudulent acts against the plaintiff such that s 304 of the Companies Act does not apply.

[55] However defendant 1's contention that the company could have entered into the tenancy with the plaintiff as at the time of entering the tenancy agreement, the agreement with Tekad dated 10 June 2003 was valid and the company thus had valid possession of the demised premises cannot hold. The evidence of PW1 when referred to cl 4.1 of Tekad's agreement with the company dated 10 June 2003 and when asked when the 1st initial period will expire said It should be June 2006. Based on cl 4.2 the next three years will expire in June 2009. This was next asked:

A Qn: I put it to you your answer at page 12 of your Q&A saying that the Company has no locus standi to sub let the demised premises was not correct because at the material time the Company had a contract which will only expire in June 2009?

B Ans: I do not agree.

Qn: What do you mean that the Defendant or the Company doesn't have the authority to sub let when it is stated here clearly that they were still under a valid contract until 2009. Can you explain why?

C Ans: Because the Tenancy Agreement entered into between Plaintiff and the Company was based on the forged.

...

The forged agreement between the Company and Tekad.

D Qn: ... there are two sets of agreement which were disputed in suit 585. am referring now to the agreement which is held valid by the court and this is the agreement which I referred to just now dated 10-6-2003. I put it to you that even with the first agreement which was declared forged or whatever, the Company has still a valid agreement which will only expire on June 2009?

E Ans: I do not agree.

(NOP 1/28–29).

F **[56]** It was also explained by PW1 in cross-examination as follows: '... as I mentioned just now for the plaintiff to come in to operate in that place previously known as pasaraya we neen to put in a lot of investment and we did, in fact we put in amount of more than RM20m as an investment to that place and of course to start our investment and operation there we need a long period

G of tenancy for that demised premises to be there first before we could make such a huge investment so that we can get back the returns. For this, the so called management agreement dated 10 June 2003 it actually only offer the longest the longest term will be 6 years of tenant. If The Store is going to base on this 6 years of tenant and to rent it or to have a long term tenancy agreement,

H the Store will definitely won't be agreed and it won't be advisable investment for us to do that.'.

(NOP1/66).

I **[57]** The Store wanted the premises for at least above 15 years. The management agreement was not referred to in the agreement in 82/47–61. As to what document the tenancy agreement referred to as the basis for renting the demised premises this was in cl 2.3 of p 48 which was the forged agreement. (All in NOP1/67–68).

[58] Thus the tenancy agreement was premised on the purported main tenancy agreement which was forged which the plaintiff thought to be genuine. If the tenancy was for 3+3 it would not have been a good investment decision for the plaintiff who after pouring in more than RM20m would have wanted at least a duration of above 15 years.

[59] Irrespective of the above finding, defendant 1 neverthess had no knowledge of the forgery and in particular the tenancy agreement was entered into at a time when the administration, management and finance of the company was not under his control.

INVOLVEMENT OF DEFENDANT 6

[60] It was an agreed fact that defendant 6 was a director from 6 March 2007 till 22 January 2014 and the wife to defendant 4. The evidence as seen earlier showed defendant 4 to be the majority shareholder of the company through his shareholding in IE design. it is not disputed defendant 4 was a bankrupt since 12 October 2010.

(a) Acts prior to March 2007

[61] According to defendant 6 as she was only a director from March 2007 she could not have been involved in the agreement between Tekad, the plaintiff, the forged documents nor made any representations that would have induced the plaintiff to enter into the tenancy agreement.

[62] It was PW1's evidence in cross-examination that when the tenancy agreement was entered defendant 6 was not a director. The same too for the purported main tenancy agreement and the purported letter. He further agreed that defendant 6 could not have made the representations as she was not a director then (NOP1/48–49). He however disagreed there was no basis to say the following — in his Q&A 15, that defendant 6 perpetuated fraudulent acts on the plaintiff; in Q&A 16 and 3 (WSP1A) that defendant 6 had full knowledge of the forgery; in Q&A 17 that defendant 6 had caused the plaintiff to enter into the tenancy agreement or forged the agreement or letter (NOP1/50).

[63] In re-examination as to why he disagreed that as defendant 6 was not a director when the forged tenancy agreement was relied on she could not have known about it he said the first point was that defendant 6 is the wife to defendant 4 and defendant 4 has been a director since 2004 and she would have been fully aware of the transaction. His second point was that from her appointment as director in 2007 she would have gone though the trial between

A the company and Tekad and the company and the plaintiff and she authorised the transactions with regard to the operations and accounts (NOP1/62–63).

[64] PW1's evidence to say that defendant 6 would have been fully aware of what happened in the company prior to her appointment as director just by being defendant 4's wife cannot be equated to her being responsible for the fraudulent acts of defendant 4, if any. His second point on her having gone though the litigation cannot without more mean she had knowledge of the representations and forged documents.

[65] As defendant 6 is not responsible for any fraudulent acts before she became a director she is not liable to the plaintiff for the loss and damage said to be suffered by the plaintiff before then which originated from the forged documents and the representations. These are the damages and costs as per COA order, rental paid and the legal costs.

(b) Acts after March 2007

[66] The above finding be different after she became a director. Here her supplementary oral evidence was when she was director, the company was managed by defendant 1, defendant 2 and defendant 4. In relation to the cheques signed by her in 84/256–289 she said when it was presented to her she signed as she was merely a rubber stamp and to help defendant 1, defendant 2 and defendant 4 (NOP3/7–8).

[67] It was her position as confirmed in cross-examination 'eveything is handled by her husband and the other directors. And she knows nothing about the company. She was asked if being a director she had access to the documents of the company stated 'I should have access but I never seen all the documents because it was all handled by D4'. (NOP3/42). This was next asked:

> Qn: ... it's quite convenient for you to push it off to your husband but the evidence seems to suggest on what you have exhibited in the bundles that you would have access to the documents because you exhibited the bank statements of Rohaizat Holdings S/B?
>
> Ans: That was all from D4 my husband.
>
> Qn: So you therefore through your husband you would have access to the documents ...
>
> Ans: Through my husband, yes, I would have access.

(NOP3/43).

[68] It had earlier been shown in evidence that the last authorised signatories of the company were defendant 6 or Atlia (circular resolution dated 23 September 2011, 84/151). A

[69] Her evidence that despite being a director and a signatory she was a mere rubber stamp cannot be possibly be true. This is more so when viewed in the light of the evidence of Lieu, defendant 6's own witness. B

[70] It was Lieu's evidence in chief that before the company was wound up it was defendant 1, defendant 4 and himself that were involved in the management and not defendant 6 and then 'after involved ... in financial' (NOP2/46–47). As to how defendant 6 was involved he said 'like Bendahari'. As to who defendant 6 received instructions from in financial aspects he replied 'follow the direction from' defendant 4 (NOP2/48). To a suggestion by defendant 1 counsel that defendant 6 is the controlling mind of the financial affairs of the company and she received instructions from defendant 4 he replied 'Yes' (NOP2/52). When asked in cross-examination by the plaintiff counsel that 'participated like a treasurer ... she handled the finance?' he answered 'Yes, take care the financial part' (NOP2/63) and that bank statements would go to defendant 4 and defendant 6 and cheque books and management accounts are within their control (NOP2/66–67). In re-examination as to who actually controlled the accounts he said it was defendant 6 and defendant 4 (NOP2/71). C D E

[71] The Court accepts Lieu's evidence as he was a neutral witness as opposed to defendant 6. Although he was defendant 2, he had not entered apperance to defend himself as he was a bankrupt (NOP2/64). Lieu's evidence at its highest showed that defendant 6 took care of the finance or at the very least showed both defendant 6 and defendant 4 were responsible. F G

[72] Thus although defendant 6 said everything was left to defendant 4, Lieu's evidence shows the contrary.

[73] Further all the directors were bankrupts. It was defendant 6's own evidence she was aware that as bankrupts they were disqualified from being directors and she agreed this effectively left her as the only director legally empowered to control the company. She also agreed she was the only person legally responsible for the acts of the company. (NOP3/43–44). Defendant 6 was thus responsible for the management and operation of the company including finance enhanced by her being an authorised signatory. H I

(i) The RM1.5m

[74] The stay order required the plaintiff to pay RM1.5m to the company and this was done on 11 October 2011.

[75] It is an agreed fact that from 18 October 2011 to 24 November 2011 the company had deposited a total sum of RM910,000 to defendant 6. According to the plaintiff this was a dishonest and/or illegal siphoning of money by defendant 6.

[76] Defendant 6 stated her intention was only to help the company as she had faith in it. She denied that after RM1.5m was paid to the company she siphoned RM910,000. Before the payment of RM1.5m the balance in the company account was less than RM120,000 as seen in 84/183–184.

[77] It was the company that was indebted to for RM570,558.65 which were advances plus interest as at October 2011. This is seen in Q&A 17 of her witness statement as follows:

No.	Year	Total
i.	Advance payment on year 2007 together with interest on the same until October 2011	RM96,925.13
ii.	Advance payment on year 2008 togehter with the interest on the same until October 2011	RM439,689.64
iii.	Advance payment on year 2009 together with .interest on the same until October 2011	RM5,878.98
iv.	Advance payment on year 2010 together with interest on the same until October 2011	RM11,002.90
v.	Advance payment on year 2011 together with interest on the same until October 2011	RM17,389.00
	Total	RM570,885.65

[78] Thus the sum of RM910,000 was paid to her as repayment for the advance along with interest. The advance was made because the company was in weak financial status. Paragraph 18.1–18.25 set out the details of the advance made in 2007–2011. So for example in para 18.1 she stated on 11 May 2007 she advanced RM5,000 by MBB cheque no 324951 and 88/33–36 showed her bank statement and p 33 the clerance of the cheque.

[79] Although the advance was RM570,885.65 she explained in Q&A 19 the company paid RM910,000 and she repaid a total of RM181,407.60 as follows:

Since November 2011, I have made repayment in the sum of RM181,407.60 to the said Company and the particulars are as folllowing —

i.	November 2011	RM20,000
ii.	2012	RM139,407.60
iii.	2013	RM22,000
	Total	RM181,407.60

[80] She further explained in her Q&A 21 of payments made by the company after it received the RM1.5m as follows:

i.	Wong Lai Chor (as the repayment for the loan given by Wong Lai Chor to the said Company	RM450,000
ii.	Tetuan K M Ong, Lee & Co	RM53,330
iii.	Lieu Lu Sang (the 2nd Defendant) (Loan to Lieu Lu Sang and/or to the 1st Defendant)	RM171,500
iv.	Tetuan K F Chua & Partners (Legal Fees fo acting for the said company)	RM12,000
v.	Tetuan K SPang & Co (Legal Fees for acting for the said Company)	RM33,200
vi.	Wong Swee Wah (the 6th Defendant) (the repayment for the advance payment together with interest by the said Company)	RM910,000
vii.	Tetuan L Parthiban, Zulkiflee & Associate (Legal Fees for to acting for the said Company)	RM150,000

The details of each transaction were as stated in Schedule A.

[81] In cross-examination by defendant 1 counsel when asked that despite the financial weakness of the company she and Atilia had made payments out of the RM1.5m received she replied 'yes'. It was put to her that either her or Atilia had taken turns to sign and issue cheques and made payments to various parties including herself she replied 'I'll just speak for myself, yes'. (All in NOP3/25–26).

[82] She was referred to cheques signed by Atilia in 84/251, 253, 255 and 256 and asked whether there was a voucher approved by a director said 'I'm not aware'. She was next asked:

Qn: Did your company practice on having a voucher, a payment voucher before a cheque is allowed to be signed or authorised to be paid?

Ans: I'm not aware of this.

Qn: You mean in your company you just sign a cheque without having a voucher?

Ans: Yes.

(NOP3/27–28).

[83] She was next referred to cheques in 84/257–291 and agreed she signed them and without any payment voucher. She was then asked:

Qn: Did you seek any authorisation from other directors because it is company's cheque, you know, not personal cheque?

Ans: Yes, yes.

Qn: Yes, you have proof that you have obtained authority from these other directors, you have documents to prove? Ans: I don't have.

Qn: How did you manage to get the approval, ... in that sense, if you dont have approval?

Ans: From D4.

(NOP3/28–29).

[84] With regard to the loan from her to the company and the interest to be paid, she stated there was no resolution passed by the company (NOP3/30–31). As to how when the loan with interest was RM570,885.65 and the company paid RM910,000 leaving there to be a difference of about RM339,000 she said this was a loan from her and there was no resolution (NOP3/32–34). She denied there was a collaboration with defendant 4 to take out the money. She agreed that although she was not a shareholder she took out RM910,000 from the company's accout (NOP3/35).

[85] In cross-exmination by the plaintiff counsel as to her evidence of loaning money to the company and having faith and to help the company she was then asked:

Qn: This would mean in order to have faith in this Company, to purportedly lend all this money, you have to understand the business of the Company and the goings on of the Company. Would you not agree to that?

Ans: I disagree.

...

I was very ... I mean I am very busy with my work. So I don't really have much involvement in the Company. And whatever I know is from my husband. And I also have faith in my husband and I trusted him and I believed him. So that's why when it was in financial problem and he asked me to lend some money to the Company and I did so.

Qn: ... you and your husband are effectively one and the same, both of you are partners in this. That would be the accurate description of

the resaon why you are a director and the reason why you say you have faith in the Company. Am I correct?

Ans: Yes.

(NOP3/48).

[86] She was not aware the company had not been filing its accounts since 2002 and then said she knew from her husband. She explained further:

> I know that they were trying to audit accounts but because of all the dispute and things going on, he couldn't do it.
>
> ...
>
> So I know from him he was trying to make proper set of accounts and he wanted to, that's why he set up an office, get a manager, he wanted to do it properly to audit the accounts. But because of so many legal disputes going on, he couldn't manage to do it.
>
> (NOP3/52–53).

[87] She disagreed that for many companies in the country and the world involved in litigation that doesnt stop them from auditing the accounts. It was then put to her that irrespective of whatever litigation the company is going though it did not stop the company nor its directors from ensuring the company is audited and the financial affairs reported stated 'I agree that it shouldn't stop the directors' and 'that's why my husband was trying'. (All in NOP53–54).

[88] It was then asked that as there were no accounts filed from 2002–2004 there was no evidence to show the loan from her was actually made replied she disagreed and then said 'I dont have accounts but I do have statements. I do have cheques I issued to the Company and it can be seen from my here'. (NOP3/54).

[89] She disagreed from the cheques issued one would not know the purpose and it did not denote a loan. She further disagreed there was no evidence to support the payment was a loan (All in NOP3/55).

[90] With regard to the payments made for repayment of a loan to Wong Lai Chor, she stated that Wong was defendant 4's sister and she was not aware of any evidence of a loan to Wong in the bundle of documents.

[91] She was aware of the stay order and that the money came in. As to whether she was aware if the company lost the appeal the money had to be repaid she replied no and that the company appealed. She was not aware of an

appeal by the plaintiff. (NOP3/60–61). She disagreed to the suggestion she would be aware due to being the only director with legal standing that the lawyers would have informed her. She further stated 'they didnt inform me. Most of the time they go though my husband'. (NOP3/62).

[92] It was finally put to her:

> Qn: A common pattern.
>
> Judge: What's the question?
>
> Qn: In that basically youself as the wife, the sister Wong Lai Char. Atilia who is the niece, your husband who is a bankrupt, you all seem to be in control of the finances of the Company. Would you agree with me?
>
> Ans: I disagree.
>
> Qn: Well, payments are made to family members more than anything else without any. I put it to you that paments are made to what is effectively family members, the sister, the wife yourself without any evidence whatsover that these are legitimate. There are no accounts, cheques were signed by you the wife, signed by the niece. Now the conclusion is this. Basically yourself being the only director with standing there, acting in concert with your husband and other family members took all took the majority of these monies out after my client paid the RM1.5 million with no intent without any regard to the fact that the Company has to pay the RM1.5 million back. Would you not agree with me?
>
> Ans: I disagree.
>
> (NOP3/70).

[93] In re-examination as to her disagreeing that she actively controlled the company's finance and yet she signed the cheques she stated she did not participate in the running of the company and her intention was to help her husband and the company. As to why she was appointed signatory she said she agreed to help out. On why she signed the resolutions her reply was to help her husband and she trusted him. As to why she signed the cheques when the company was in weak financial status this was because they had received RM1.5m and it was her understanding they could use the money; since the company owed her money the company decided she can actually have some money as repayment and a part loan and some for legal fees. As to who in the company decided it was defendant 4, defendant 2 and sometimes defendant 1. (All in NOP3/71–3).

[94] As to why she signed cheques without payment vouchers she explained thus:

Ans: I was made known to my husband that when the time comes he will actually try to audit all the accounts and make it legal. So I just trusted him and I just signed it because he told me that he will actually try to audit the accounts as soon as possible.

(NOP3/73).

[95] On the absence of resolution for the advance she said the company needed the money for legal fees and she wasn't that concerned about a resolution. The interest was verbally agreed by the directors who were defendant 4, defendant 2 and defendant 1 and her husband told her it was ok to take the interest. (All in NOP3/73–73).

[96] As to her having taking RM910,000 when she advanced about RM570,000 she explained she made some repayment as in her Q&A 19 and the rest was a loan from the company to her (NOP3/76–77).

[97] As to why she did not agree there was no evidence to support the payment by her was a loan to the company her answer was as follows:

Ans: Because it was clearly shown that I have actually made that payment to the Company and we also produced the cheque some of the cheque images and also the statements that clearly showed that amount was actually entered into the Company.

(NOP3/77).

[98] The payment to Wong Lai Chor was by a cheque signed by Atilia (NOP3/79).

[99] The court finds it not probable for defendant 6 to not know that if the company lost the appeal it would have to pay back the RM1.5m. Her earlier evidence was that she was the only director left standing, as it were, since the other directors were bankrupts and she was the only one legally empowered to control the company. It was not probable as per her evidence the lawyers did not inform her of the plaintiff's appeal and the consequences arising thereof, but to defendant 4 instead, who was a bankrupt. When the stay order was made defendant 6 was already a director and would have been involved in causing the plaintiff to pay the RM1.5m.

[100] From the evidence of defendant 6 although she said the RM910,000 from the company to her was a repayment of an advance with 8% interest she herself admitted there was no company resolution for the advance or the interest and no payment voucher before the issuance of the cheques. The advance with interest totalled RM570,885.65 and the company paid RM910,000 leaving there to be a difference of about RM339,000 which she then said was partly repaid and the rest was a loan but again with no resolution.

A She attempted to explain away the absence of resolutions to the urgent need by the company for money and that she wasn't that concerned about a resolution and that defendant 4 said it was alright to take interest. As to why there was no payment voucher this was due to her trust in defendant 4 who was trying to audit the accounts and make it legal. These explanations are contrary to the B workings of a company where resolutions and payment vouchers are required. Similarly the loan to Lieu was also not supported by any resolution. The repayment of a loan to Wong Lai Chor was not supported by any agreement and all defendant 6 could say was that the cheque was signed by Atilia ignoring that defendant 6 was the director ultimately responsible to the company. It C bears repeating that Wong Lai Chor is defendant 4's sister and Atilia his niece.

[101] Aside from there being no resolution or payment voucher there were no company accounts to show the payment made and the purpose for which it was D made. As stated by defendant 6 she was informed by defendant 4 the company had not been filing its accounts since 2002 but that he was trying to right the situation and was unable to do so due to the ongoing dispute. She however agreed that litigation should not stop the company from ensuring the accounts are audited.

E

[102] Lieu's evidence of an advance from defendant 6 and the 8% interest does not assist defendant 6 as he stated there was no resolution to this effect. Although he did say the cheques in 84/258, 263, 268 and 271 were a loan to him and authorised by the company, his evidence suffers the same fate of an F absence of resolution.

[103] On the payment of RM35,000 to Andrew Tan ('Andrew') PW1 said he was the regional southern manager of the plaintiff until his resignation before disciplinary action could be taken for providing documents to the company. G Andrew admitted he gave the documents pursuant to a bribery or loan by the company. This was a bribe and demonstrated the fraudulent conduct of the defendants.

H **[104]** In cross-examination by defendant 1 counsel PW1 was referred to the police report made against Andrew in 810/1–2 where he stated it was for receiving certain benefit from defendant 4 in exchange for certain documents from the plaintiff during the suit with the company. The benefit was a loan of RM35,000 by the company to Andrew. He confirmed 810/3 was a letter I written by Andrew to the plaintiff's managing director. It was stated in the letter that defendant 4 authorised the payment of RM35,000 to him. He agreed the signatory of the cheque in 810/4 based on the circular resolution were defendant 6 and Atilia. He agreed defendant 4 had orchestrated the

bribery and received documents in exchange. He agreed defendant 4 with the assistance of defendant 6 had colluded in giving bribery to Andrew. (All in NOP1/42–45). A

[105] In cross-examination by defendant 6 counsel he agreed the cheque to Andrew was not signed by defendant 6 and her name is not stated in the letter in 810/3. He disagreed there was no proof that defendant 6 participated in the transaction and added the account number stated in the letter belonged to defendant 6 (NOP1/57–58). B

[106] In re-examination he explained that in the letter 810/3 Andrew admitted to paying RM300 monthly into MBB account No 501299515664 which belonged to defendant 6 (NOP1/60). C

[107] Defendant 6 said her MBB account No was not 501299515664 but 501299515604 (NOP3/35). D

[108] A perusal of defendant 6's bank statements in B8 for example pp 33 and 39 would indeed show that her MBB account no was 501299515604. However this and the fact she did not sign the cheque to Andrew does not mean she was not involved in the transaction due to her standing as a director ultimately responsible to the company. E

[109] All the above payments point towards defendant 6 assisting defendant 4 in siphoning the money from the stay order within a short span of two weeks from when the RM1.5m was paid with regard to the RM910,00 and RM450,000. There could have been no intention to pay back the money at a later stage knowing the matter was still pending in COA. F

[110] It was very much a family affair with defendant 4 assisted by his wife defendant 6, his sister and niece Atilia. Although denied by defendant 6, the suggestion that defendant 4, defendant 6 and Atilia were in control of the finances with defendant 6 and Atilia being authorised to sign cheques, hold true. The payment was made essentially to family members with no resolution and no documents in support. This was with the assistance and participation of defendant 6. Going by defendant 6 own evidence there was no discernable difference between defendant 4, herself and the company where she agreed to the suggestion that 'you and your husband are one and the same, both of you are partners in this' and that was why she was a director and why she had faith in the company. G H I

[111] It does not lie on defendant 6 that she was moved to do all the above out of faith in the company and belief in her husband. As the only legally competent director her responsiblity to the company ought to prevail over

helping her husband unquestioningly and out of love and loyalty. If indeed the company was weak financially the money ought not to have utilised primarily for the benefit of family members especially when she said her only intention was to help the company. Defendant 6 as well as defendant 4's sister had derived financial benefit namely RM910,000 and RM450,000.

[112] With regard to the other payments made in Schedule A which were mainly legal fees it was submitted these were not disputed as no challenge on such payments as was done for the advance and interest, loan to Lieu, repayment of a loan to Wong Lai Chor and payment to Andrew. In this regard the court accepts this contention on the authority of *Aik Ming (M) Sdn Bhd & Ors v Chang Chin Chuen & Ors and another appeal* [1995] 2 MLJ 770; [1995] 1 MLRA 546 where evidence not challenged and/or disputed during cross-examination will be deemed as admission.

[113] Under the circumstances a sum of RM910,000 (payment to defendant 6) RM450,000 (payment of a loan to Wong Lai Chor), RM171,500 (loan to Lieu) and RM35,000 (payment to Andrew) were siphoned from the company's account. This was without due regard to resolutions, payment vouchers and support documents. This is a fit and proper case for the application of s 304(1) of the Companies Act 1965 where defendant 6 as director had the intention to defraud creditors in causing the payment of the RM1.5m to the company by siphoning it out without intending to pay it back despite knowing it had to, if the plaintiff won the appeal. These amounts exceed RM1.5m and since the claim was for the money paid pursuant to stay order of RM1.5m this will be the amount allowed.

WHETHER THE PLAINTIFF A CREDITOR

[114] The contention that the plaintiff was not a creditor of the company at the time when the RM1.5m was paid is best answered with reference to the Federal Court case of *Dato' Prem Krishna Sahgal v Muniandy a/l Nadasan & Ors* [2018] 2 MLJ 693; [2017] 10 CLJ 385 where it was held that 'creditor' in s 304 includes contingent or prospective creditor. It was stated at p 411 that:

> We agree with the view that the word 'creditor' in s 304 of the Act must be taken to include 'contingent or prospective creditor' as being used in s 217(b) of the Act and the word 'prospective creditor' refers to a creditor whose claim for debt or right to enforce such claim is expected or likely to happen in future.

[115] The plaintiff thus falls within the meaning of 'creditor' in s 304 as the RM1.5m had to be paid back if the plaintiff won the appeal, which it did.

NOT LIABLE FOR MORE THAN WHAT THE COMPANY HAD AT THE MATERIAL TIME

[116] It was also contended the company did not have RM3,961,261.55 at the material time such that defendant 6 could not have siphoned the sum alleged. The evidence with reference to the company's bank statement for October 2011 before the payment of RM1.5m in 84/183 shows the company had less than RM150,000. This was confirmed by PW1 (NOP1/55).

[117] Be that as it may the specific fraudulent conduct being alleged in para 30.6 against defendant 6 was in reference to after the RM1.5m had been paid. The Australian case of *Re Mahel Investments Pty Ltd and the Companies Act* (1979) 4 ACLR 35 does not assist defendant 6 where what was stated was that the 'liability should be limited to the debts which may fairly be attributed to the course of conduct on which he has been convicted'. This is what this court has determined which is that defendant 6 had participated in the siphoning of the RM1.5m.

WHETHER ADVERSE INFERENCE IN NOT CALLING DEFENDANT 4

[118] The contention there ought to be an adverse inference against both defendant 1 and defendant 6 in not calling defendant 4 as a witness despite their shifting of responsiblity to defendant 4 must necessarily fail. It had been shown through the sale and purchase of shares agreement where IE Design became the majority shareholder in the company and defendant 4 by virtue of being the majority shareholder in IE Design was the majority shareholder in the company and soon after the director who effectively controlled the company. The proceeds of rental agreement meant defendant 4 had the authority to deal on matters pertaining to The Store. There was also PW1's evidence in cross-examination where he agreed defendant 4 and defendant 6 were the directors directly involved in the operation and finance of the company (NOP1/39) and that there was incriminating evidence to show defendant 4 and defendant 6 were the mastermind behind the company (NOP1/45). It was also Lieu's evidence that before the company was wound up defendant 4 was one of the directors involved in the management (NOP2/46).

NO DEFENCE FOR DEFENDANT 2 TO DEFENDANT 4

[119] Defendant 2 to defendant 4 had not entered appearance for this action. They are deemed to have admitted to all the allegations in the statement of claim.

A CONCLUSION

[120] The plaintiff's case against defendant 1 is dismissed with costs. The plaintiff's claim against defendant 6 in para 36.1 is allowed only in relation to the debt pursuant to the stay order and in para 36.2 for the amount of RM1.5m with 5% interest per annum from 21 July 2014 until the date of realisation and the rest dismissed. Costs to the plaintiff.

B

[121] Judgment to be entered against defendant 2 to defendant 4 as per para 36.2 with no costs.

C

Reported by Ashok Kumar

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